No. 18-459

In the Supreme Court of the United States

EMULEX CORPORATION, ET AL.,

Petitioners,

v.

GARY VARJABEDIAN AND JERRY MUTZA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

SHAY DVORETZKY
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., NW
Suite 1000
Washington, DC 20001
(202) 879-3939

GREGORY G. GARRE
Counsel of Record
BENJAMIN W. SNYDER
SAMIR DEGER-SEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

ANNIE M. GOWEN
LATHAM & WATKINS LLP
330 North Wabash Ave.
Suite 280
Chicago, IL 60611
(312) 876-7700

Counsel for Petitioners

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INTRODUCTION

The question presented is whether Section 14(e) of the Securities Exchange Act of 1934 supports an implied private right of action for mere negligence. As we explained in our opening brief, there are two ways the Court could approach that question. Taking the Ninth Circuit's decision based on that court's own premise that an inferred private right of action exists under Section 14(e) for intentional violations, the Court could hold that the Ninth Circuit erred in *expanding* that inferred right to cover negligence. Or, the Court could hold that there is no basis to infer *any* private remedy under Section 14(e) at all.

The government, joined by the SEC, argues that this Court should decide this case on the "predicate" ground that Section 14(e) does not confer any private right of action. U.S. Br. 27-28 (citation omitted). In return, Respondents focus on just evading the issue, arguing waiver. But as the government explains (at 27-28), this argument is properly before the Court. And on the merits, it becomes clear why Respondents focus on waiver. They have no real answer for how one could possibly infer any private cause of action from Section 14(e) under the stringent test in *Alexander v. Sandoval*, 532 U.S. 275 (2001). Indeed, Respondents concede (at 44) that Section 14(e) lacks "'rights-creating' language." That is the end of the ball game under this Court's modern test. And, especially in light of the SEC's own position, recognizing the absence of any private right of action is now the simplest path to resolving this case.

Nevertheless, even assuming that a private remedy could be inferred under Section 14(e) for intentional violations, the Ninth Circuit erred in

expanding that private remedy to cover negligence. On this argument, the government agrees with Respondents that the text of Section 14(e) itself does not require scienter. U.S. Br. 10-12. That reading is flawed, but more importantly, it is incomplete. The question here is not the scope of Section 14(e) in the abstract. Instead, it is whether a court should infer a private remedy for negligence under Section 14(e)—an inquiry that must consider the surrounding provisions and structure of the securities laws as well. On that question, the government hardly joins Respondents. Indeed, it appears to recognize (at 19-20, 32) that the full statutory record, including the "procedural limitations" Congress imposed on the express causes of action for negligence under the 1933 Act, support the conclusion that Congress did *not* intend to create an unstated private negligence remedy for violations of Section 14(e).

The government's brief underscores how the two ways of looking at this case are interrelated. But either way, the Ninth Circuit erred in inferring an unstated, and previously unknown, private right of action for negligent violations of Section 14(e).

ARGUMENT

I. AS THE GOVERNMENT EXPLAINS, SECTION 14(e) DOES NOT CREATE ANY PRIVATE RIGHT OF ACTION AT ALL

In *Alexander v. Sandoval*, 532 U.S. 275 (2001), this Court declared that it was getting out of the business of inferring private rights, after singling out *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), as epitomizing the old regime it was "abandon[ing]." 532 U.S. at 287. Respondents ask this Court to turn back the clock. Indeed, the central theme of their brief is "*Borak*

lives!"—or ought to. Not only do Respondents cite *Borak* "*passim*" (at V) and repeatedly invoke its purpose-driven analysis for inferring private remedies, but they argue that this Court must double down on *Borak*: Having inferred a private remedy under Section 14(a) of the 1934 Act in *Borak*, Respondents say (at 35-38), the Court must follow suit under Section 14(e) now. But two wrongs have never made a right. And, as the government explains (at 27), under the *governing* test for determining whether a court may infer a private right—*Sandoval*'s—"private litigants like respondents may not sue for violations of Section 14(e)."

A. Respondents' Waiver Argument Fails

No doubt this explains why Respondents' primary response is *not* to argue that an inferred private right exists under the *Sandoval* test, but to argue (at (I), 7, 26-27) that the Court should simply ignore the elephant in the room because this broader argument was purportedly waived. That is incorrect.

First, as the government explains, "the determination whether a private right exists is 'predicate to an intelligent resolution of the question' whether Section 14(e) encompasses negligent misrepresentations." U.S. Br. 27-28 (quoting *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996)). Indeed, it is "impossible to consider whether" Section 14(e)'s private right extends to negligence "without first assuming" that such a right exists. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995). That is precisely the sort of intertwined relationship between arguments that this Court has held makes an issue fairly "embraced within" the question presented and ripe for resolution. *Id* at 382.

In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, for example, this Court "*sua sponte* directed the parties to address [the] question" whether a private cause of action against aiders and abettors exists under Section 10(b) of the 1934 Act, even though the petitioners there had "*assumed* the existence of [such] a right" at the certiorari stage. 511 U.S. 164, 194-95 (1994) (Stevens, J., dissenting); *see id.* at 170 (majority). Here, Petitioners indisputably raised the argument at the certiorari stage, making this an *a fortiorari* case under *Central Bank* for considering whether any private right exists.

Second, the case for review is even stronger here because Petitioners even raised the broader argument below, telling the Ninth Circuit in their en banc petition that a ruling that Section 14(e) sweeps in negligence would be "grounds for *eliminating* [that court's] implied private right of action." CA9 Pet. for Reh'g 14. It would have been futile for Petitioners to advance this argument earlier under existing circuit precedent. *See Yovino v. Rizo*, 139 S. Ct. 706, 708 (2019). And although Respondents now claim (at 27) that Petitioners were required to say more (and should be faulted for not *disputing* that precedent at the panel stage), they fail to recognize the interrelationship between the narrower and broader arguments for why the Ninth Circuit was wrong.

Third, it is settled that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim" before this Court. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Petitioners have always maintained that private parties cannot recover under Section 14(e) for mere negligence; the contention that Section 14(e) does not create *any* private remedy is just another argument in support of

that claim. Thus, the argument could be considered by this Court even if petitioners "expressly disavowed [the argument] in both the District Court and the Court of Appeals." *Lebron*, 513 U.S. at 378-79.

B. Respondents Do Not Come Close To Meeting The *Sandoval* Test

On the merits, Respondents essentially concede that they cannot satisfy the *Sandoval* test for establishing an implied private right. So they focus their argument on urging this Court to go around *Sandoval*—even going so far as to argue that the Court should (and must) follow *Borak* instead.

1. Respondents essentially concede that they cannot meet the Sandoval *test.*

Under the two-part framework set forth in *Sandoval*, Respondents all but admit that Section 14(e) does not create any private right of action.

Respondents concede that Section 14(e) does "not have traditional 'rights-creating' language." Resp. Br. 44 (citation omitted). To fill this glaring omission, Respondents argue that "the entire statute was *designed to* create rights." *Id.* (emphasis altered). But that is just a request to revert to the kind of purpose-driven rationale that this Court rejected in *Sandoval*. 532 U.S. at 287; *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) ("[T]he mere fact that § 17(a) was designed to provide protection for brokers' customers does not require the implication of a private damages action in their behalf."). Instead, "'[t]he question whether Congress . . . intended to create a private right of action [is] definitively answered in the negative' where a 'statute *by its terms* grants no private rights to any

identifiable class.'" *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (alterations in original) (emphasis added) (citation omitted). Under *Sandoval*, Section 14(e)'s lack of rights-creating language is fatal.

Respondents likewise do not attempt to satisfy the second part of the modern private-right-of-action test—whether Section 14(e) manifests an intent to create "a private remedy." *Id.* at 284; *see Sandoval*, 532 U.S. at 290. Nor do Respondents contest that the many express causes of action in the Exchange Act create a "presumption that a [private] remedy was deliberately omitted." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (citation omitted). Instead, they simply assert (at 45) that this presumption should not apply here because Section 14(e) was drafted "against a backdrop where implied rights *were* recognized." But that argument is squarely foreclosed by *Sandoval*, too. 532 U.S. at 287; *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) (applying clear statement rule to statute enacted before rule was adopted by the Court).

2. Respondents' efforts to conjure up another basis for inferring a private remedy should be rejected.

Unable to satisfy *Sandoval*'s text-based analysis, Respondents urge this Court to adopt various context-driven exceptions that would blow a hole through *Sandoval* itself. That request should be rejected.

1. Respondents argue (at 30) that this Court should follow *Cannon v. University of Chicago*, 441 U.S. 677 (1979), not *Sandoval*, and hold that Congress must have intended a private right of action under Section 14(e) because it "modeled" Section 14(e) on Rule 10b-5, which is privately enforceable under

Section 10(b). But *Cannon*'s "contemporary legal context" analysis is not an exception to *Sandoval*. *See id.* at 698-99. To the contrary, *Sandoval* makes clear that "legal context matters only to the extent it clarifies text." 532 U.S. at 288; *see id.* at 314 (Stevens, J., dissenting) (criticizing majority for *refusing* to consider "contemporary context" evidence).

Moreover, this case is entirely different from *Cannon*. There, Congress reenacted the "verbatim *statutory* text" (from Title VI). *Sandoval*, 532 U.S. at 288. The language on which Respondents rely here comes from a *regulation* (Rule 10b-5), which cannot itself have created a private cause of action. *See id.* at 291 ("Language in a regulation . . . may not create a right that Congress has not."). Instead, the "statutory text" from which lower courts had inferred a cause of action at the time Section 14(e) was passed was Section 10(b)—which Congress notably did *not* replicate in Section 14(e). *See id.* Accordingly, the *Cannon* analysis simply reaffirms that Congress did not intend to create a private right of action when it used different language in Section 14(e).[1]

2. Respondents next turn to *Borak* and argue that, because Section 14(e) was designed to fill a "gap" left by Section 14(a)'s regulation of proxy statements, and because this Court inferred a private right of action under Section 14(a) in *Borak*, it follows that Congress must have intended an inferred private right of action

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[1] Of course, the fact that Congress adopted Rule 10b-5's language near verbatim in drafting Section 14(e) *does* signal that Congress intended Section 14(e) to have the same substantive *scope* as Rule 10b-5. That conclusion follows from basic statutory interpretation principles. *See infra* at 13-15.

under Section 14(e) as well. Resp. Br. 34-38. This argument should be rejected, too.

To begin with, the notion that Congress must have intended an implied private right in Section 14(e) because this Court had implied one in *Borak* for Section 14(a) is just another version of the "contemporary legal context" analysis rejected in *Sandoval*. 532 U.S. at 287-88; *see Touche Ross & Co.*, 442 U.S. at 577. Just like any other statute, the determination whether Section 14(e) creates an implied private right must be based on *text*, not supposed "expectations." 532 U.S. at 287-88. And, here, the text provides no reason to assume that Congress intended the same result as in *Borak*, because the text of Section 14(e) is completely different than the text of Section 14(a).

That leaves Respondents' argument (at 34 (emphasis added)) that this Court must infer a private remedy under Section 14(e) because "the *purpose* of the Williams Act was to eliminate the 'gap' between the rules for proxies and tender offers." This "purpose"-driven rationale for inferring private rights is exactly what this Court repudiated in *Sandoval*. 532 U.S. at 287-88. Moreover, Congress *did* eliminate that "gap"—by adding a new, substantive prohibition on fraudulent statements in connection with tender offers. As *amicus* Chamber of Commerce explains (at 12 (citing examples)), the Committee Reports indicate that Congress believed this gap-filling measure would be effectuated through *public* enforcement measures. And the SEC itself is not arguing that a private right of action is necessary to effectuate the Williams Act. The plaintiffs' securities bar disagrees, but if they believe the statute needs a private right of action, that is something they can take up with Congress.

3. Finally, Respondents resort to congressional silence—arguing (at 43-46) that Congress has implicitly ratified a private right of action under Section 14(e) by *failing* to overturn lower court decisions finding such an implied right to exist under the now-discredited, pre-*Sandoval* regime. But *Sandoval* squarely rejects this exact ratification-through-silence theory, too. *See* 532 U.S. at 292 (citing *Central Bank of Denver, N.A.*, 511 U.S. at 186).

Moreover, Congress has *not* been silent. In the Private Securities Litigation Reform Act (PSLRA) Congress went out of its way to say that its actions should not be "deemed to create or ratify any implied right of action." Pub. L. No. 104-67, § 203, 109 Stat. 737, 762 (1995). Although Congress was not focusing on the specific issue here, the PSLRA expressly refutes Respondents' hypothesis (at 8-9) that it is "inconceivable" Congress disagrees with this lower court case law "but simply said nothing about it."

In any event, accepting Respondents' rationale on this point would resolve the case *against* Respondents, because the private right of action "the courts have consistently authorized" is one that requires scienter. Resp. Br. 40. If Congress has "ratified" anything, therefore, it is the conclusion that there is *no* private right of action for negligent representations under Section 14(e). It makes no sense for this Court to acquiesce in the decisions of the lower courts by adopting a cause of action *broader* than any court has previously recognized.

The emphatic message of *Sandoval* is that the Court has sworn off the habit of creating private rights based on non-textual considerations like

purpose, expectations, or even silence. There is no reason for this Court to jump off the wagon here.[2]

II. THE NINTH CIRCUIT ERRED IN EXPANDING ITS PREVIOUSLY INFERRED PRIVATE RIGHT OF ACTION UNDER SECTION 14(e) TO NEGLIGENCE

Even if this Court accepts (or assumes) the Ninth Circuit's baseline premise that Section 14(e) created a private right of action for intentional violations, the Ninth Circuit erred in enlarging that right to encompass mere negligence. Respondents' counter-argument is based on the premise that Congress intends the most expansive conception of an implied right possible unless (or until) it says otherwise—the polar opposite of what this Court's cases require.

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[2] Ironically, Respondents' *amici* suggest that there is no reason to reject inference of a private remedy under Section 14(e), because Plaintiffs will just sue under Section 10(b) anyway. Institutional Investors Br. 31-33. That is incorrect. For example, under *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-35 (1975), plaintiffs cannot bring claims under Section 10(b) unless they have actually purchased or sold securities. This requirement applies even where plaintiffs request injunctive relief, a frequent tactic in seeking to coerce "nuisance settlements" for impending transactions. *See, e.g., Cowin v. Bresler*, 741 F.2d 410, 420-22 (D.C. Cir. 1984) (Bork, J.); *Sinovac Biotech Ltd. v. 1Globe Capital LLC*, No. 18-10421-NMG, 2018 WL 5017918, at *5 (D. Mass. Oct. 15, 2018). Because Section 10(b)'s purchase-or-sale requirement has not been applied under Section 14(e), plaintiffs have invoked Section 14(e) to extract those hold-up settlements instead.

A. Once Again, Respondents Ask This Court To Disregard The Restraint Demanded In Implying And Expanding Private Rights

Respondents stress throughout their brief that lower courts have for decades recognized an inferred private right of action under Section 14(e). Resp. Br. 8, 40. But in touting this history, Respondents leave out the salient fact here—up until the Ninth Circuit's decision below, every one of those courts had held that this inferred right required *scienter*. That is important, because Respondents are not just asking this Court to recognize an unwritten cause of action on which the Court has previously reserved judgment (*Piper v. Christ-Craft, Indus., Inc.*, 430 U.S. 1, 42 n.28 (1977)); they are asking this Court to dramatically *expand* the reach of the inferred cause of action the lower courts had previously recognized—to new actors, new circumstances, and a far greater swath of alleged misconduct. *See* Pet. Br. 33-34.

Respondents ask the Court to consider this expansion without any of the restraint this Court exercises in inferring private rights to begin with. Once a court has taken the first step of inferring an unwritten cause of action, they say (at 25), subsequent decisions about whether to expand that inferred cause of action should be guided by a *Borak*-style inquiry into whether "the statutory objective [will be] advanced by capturing" a broader swath of conduct. And in this world, ordinary notions of congressional intent are turned upside down. Unless Congress has imposed a written *limit* on the unwritten cause of action the courts have inferred, the argument goes, the presumption is that Congress intended no such limit. *See* Resp. Br. 25; *see also id.*

at 13 n.5 ("[T]he pertinent point is there most certainly is *not* a textual basis for scienter.").

This approach is profoundly wrong, and this Court has repeatedly rejected it. Implying a private right Congress did not express in a statute is a "hazardous enterprise." *Touche Ross*, 442 U.S. at 571; *see Sandoval*, 532 U.S. at 287-88. And undertaking requests to shape—and especially to expand—such an implied private right is no less hazardous. Accordingly, this Court approaches both inquiries with the same restraint, emphasizing that "[c]oncerns with the judicial creation of a private cause of action caution against its expansion," too. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); *see also Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1402 (2018); Pet. Br. 21-22. Respondents never even acknowledge those cases, let alone explain why the caution they call for is misplaced.

Among other things, this Court's restraint means that Respondents bear the burden of showing "'affirmative' evidence of congressional intent . . . *for* an implied remedy, not against it." *Sandoval*, 532 U.S. at 293 n.8 (citation omitted); *see Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286, 300 (1993) (Thomas, J., dissenting) ("compelling reason" required to add remedy to implied private right). Here, Respondents must also overcome the anomaly that, although they confidently claim (at 5) that "Congress enacted Section 14(e) to create a private right of action premised on negligence, not scienter," it somehow took the world—and even the Ninth Circuit—50 years to discover it.

B. Respondents Identify No Affirmative Evidence That Congress Intended A Private Cause Of Action For Negligence

Respondents cannot make the showing this Court's cases demand. For one thing, the text of Section 14(e) itself, particularly in light of its origins, is best read to require scienter. But even if the Court were to disagree, that is just the beginning of the analysis, not the end. The Court must also consider the surrounding provisions and structure of the 1933 and 1934 Acts. And those provisions show that Congress would *not* have intended an inferred private cause of action to reach all the way to negligence.

1. The text of Section 14(e) does not specify a negligence standard.

To begin with, it is undisputed that Section 14(e) does not specify a negligence standard, or use the kind of language that typically connotes such a standard, like "reasonableness" or "due diligence." But the single-sentence prohibition in Section 14(e) *does* use language that unmistakably refers to intentional deception—"fraudulent," "deceptive," and "manipulative." And even the key terms used in the first clause of Section 14(e)—"untrue" and "misleading"—can be used to refer specifically to intentional (not negligent) deception. Pet. Br. 26 (quoting Oxford English Dictionary definitions). Especially given that those words are used alongside words that unmistakably connote intentional deception, it makes sense to read them in that light.[3]

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[3] Respondents argue (at 14) that this interpretation creates a "surplusage problem" for Section 14(e). But this Court just rejected a similar argument in the context of Rule 10b-5,

Respondents never directly acknowledge these dictionary definitions. The closest they come is the *ipse dixit* declaration (at 10 n.2) that, "[i]n this context, no one reads 'untrue' to mean 'dishonest' or 'misleading' to mean 'deceptive.'" But that simply is not true. Courts have read Section 14(e) for decades to require scienter. And Respondents' interpretation flies in the face of the very rule on which all agree the text of Section 14(e) was modeled. As this Court observed in *Ernst & Ernst v. Hochfelder*, it is "clear that when the Commission adopted [Rule 10b-5,] it was intended to apply only to activities that involved scienter." 425 U.S. 185, 212 (1976).[4]

Specifically, this Court explained that Rule 10b-5 was "drafted in response to a situation clearly involving intentional misconduct," and was clearly designed to protect against "fraud." 425 U.S. at 212 n.32. As the Court put it, "[t]here is no indication in the administrative history of the Rule that any of the

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which contains almost identical language and would be subject to the exact same argument. *See Lorenzo v. SEC*, No. 17-1077, 2019 WL 1369839, at *5 (U.S. Mar. 27, 2019) (recognizing that Rule 10b-5 has both "'general'" and "'specific proscription[s]'" that reach the same conduct, which "'might in other circumstances be deemed "surplusage"'" (citation omitted)).

[4] For its part, the government ignores (at 14) the dictionary definition of "misleading" as well as the fact that "untrue" can mean "dishonest." Meantime, the government argues (at 25-26) that "[c]ommon-law principles" support the conclusion that Section 14(e) proscribes negligence. But as the SEC has previously recognized, at least for damages actions, "[t]he requirement of scienter or fraud was the characteristic requirement in common law actions seeking monetary damages for fraud," and "a private damage action based on negligent misrepresentations would not lie." Brief for the SEC 25 & n.10, *Aaron v. SEC*, 446 U.S. 680 (1980) (No. 79-66).

subsections was intended to proscribe conduct not involving scienter." *Id.* at 213 n.32. When Rule 10b-5 came up for a vote at the Commission, the sole recorded comment was, "Well, . . . we are against fraud, aren't we?" Milton V. Friedman, *Administrative Procedures*, 22 Bus. Lawyer 891, 922 (1967). And if Rule 10b-5 *had* been written to reach mere negligence, it would be *ultra vires* under the delegation in Section 10(b), which—all agree—is limited to intentional wrongdoing. Pet. 30 n.8.

Of course, "untrue" and "misleading" *could* be used in a broader sense that would not require scienter, as the Court in *Aaron v. SEC*, 446 U.S. 680, 697 (1980), concluded was the case in Section 17(a)—which was passed by Congress nearly a decade before Rule 10b-5 was promulgated. *Cf. Ernst & Ernst*, 425 U.S. at 212 (stating "the language of" Rule 10b-5 could be read to reach negligence when "[v]iewed in isolation"). But given the distinctive structure and history of Section 14(e), the better reading is that Congress intended the use of "untrue" and "misleading" in Section 14(e) to refer to fraudulent conduct, just as the SEC necessarily did in Rule 10b-5.

Recognizing that Section 14(e) and Section 17(a) reach different conduct simply gives effect to Congress's intent, as informed by their different structure and distinct statutory histories. *See Aaron*, 446 U.S. at 702-03 (Burger, C.J., concurring).

2. Other provisions refute the notion that Congress intended a private right of action for negligence.

1. In any event, Section 14(e) is just one part of the inquiry. Even if the text of Section 14(e) on its own were best read as "not requiring scienter," U.S.

Br. 16, it hardly follows that Congress intended to create a *private cause of action* for negligence. In deciding whether Congress intended a private remedy for negligence, it is necessary to consider not just the text of the substantive conduct-regulating provision, but also the surrounding provisions and structure for additional evidence of Congress's intent. *See Ernst & Ernst*, 425 U.S. at 207-11. Here, those considerations all weigh decisively against inferring a private action for negligence when it comes to Section 14(e).

For this reason, *Aaron* cannot carry Respondents where they need to go. *See* Resp. Br. 10-13. The suit in *Aaron* was predicated on an express cause of action that entitled the SEC to seek injunctive relief "[*w*]*henever*" it appeared that a person was "engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions" of the 1933 Act. 15 U.S.C. § 77t(b) (emphasis added); *see Aaron*, 446 U.S. at 688. *Aaron* thus had no occasion to consider whether Congress would have intended an inferred private right of action under Section 17(a) to reach those violations.

And as Petitioners pointed out in their opening brief, the lower courts since *Aaron* have overwhelmingly concluded that Congress would *not* have intended a private right of action for negligence under Section 17(a). *See* Pet. Br. 44-45; *Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992). Respondents ignore those cases, but they underscore that identifying "the standard for establishing culpability," Resp. Br. 11 (emphasis omitted), is just *part* of the inquiry here. *See also, e.g., Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005) (describing elements beyond just a violation of Section 10(b) that

must be established by a private plaintiff suing under the cause of action inferred from that section).[5]

The government, after focusing the first half of its brief on whether Section 14(e), standing alone, proscribes negligence (U.S. Br. 13-26), ultimately recognizes that identifying the scope of a substantive provision is distinct from identifying the scope of an inferred cause of action created by the courts to enforce that provision. *See id.* at 20, 32-33. It accepts (at 19-20) that the Court has considered such additional factors as the "potential disruptive effects of a negligence-based private damages action" when resolving the scope of an inferred cause of action before, but simply says there is no need to consider those limitations here because no inferred cause of action exists under Section 14(e) at all. It pointedly does *not* argue that an inferred cause of action, if it did exist, would reach to the full boundaries of the government's interpretation of Section 14(e) for SEC enforcement actions under an express cause of action.

2. As this Court recognized in *Ernst & Ernst,* other provisions of the securities laws show that when Congress wanted to express a cause of action for

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[5] Respondents suggest that *Aaron* held the "identity of the plaintiff" and the "nature of the relief sought" are categorically irrelevant to whether a showing of scienter is required in a particular case. Resp. Br. 11 (emphasis omitted) (quoting *Aaron*, 446 U.S. at 691). That is incorrect. The quoted portion of *Aaron* dealt with Section 10(b), not Section 17(a), and simply held that because Section 10(b) itself requires a showing of scienter, a suit alleging a violation of Section 10(b) can never require *less* than that. *Aaron*, 446 U.S. at 691. *Aaron* did not consider (and had no occasion to consider) the impact of its scope-of-liability holding in an express action brought by the SEC on the existence of any inferred private right under Section 17(a).

negligence, it subjected that cause of action to "significant procedural restrictions." 425 U.S. at 209; *see id.* at 207-11 & n.28. Respondents essentially argue (at 12 n.4) that the Court should ignore this part of *Ernst & Ernst*, as if it were idle chatter. But as the government acknowledges, and the Court itself recognized in *Ernst & Ernst*, inferring a private remedy for negligence "[w]ithout such limitations . . . would 'nullify the effectiveness of the carefully drawn procedural restrictions on' certain 'express civil remedies in the 1933 Act allowing recovery for negligent conduct.'" U.S. Br. 20 (quoting *Ernst & Ernst*, 425 U.S. at 208, 210). There is no basis for ignoring that clear evidence of Congress's intent.

To say the least, "it would be 'anomalous to impute to Congress an intention in effect to expand [the implied remedy] beyond the bounds delineated for comparable express causes of action.'" *Central Bank*, 511 U.S. at 180 (citation omitted). In the few provisions of the securities laws where Congress indicated that private suits for negligence were appropriate, it tied those express causes of action to careful limits and protections against abuse. Some of those were substantive, such as limits on the filings and defendants to which the negligence-based causes of action apply. *See* Pet. Br. 33. Others were procedural, such as bond requirements or attorney fee recovery provisions. *See id.* at 31-33. *None* of them is present in Section 14(e) or the inferred cause of action that Respondents ask this Court to apply.

Substantively, Section 14(e) applies to "*any*" statement by "*any*" person made "in connection with *any* tender offer." 15 U.S.C. § 78n(e) (emphases added). As Petitioners explained in their opening brief (at 34, 40), Section 14(e) would thus apply to

inaccurate news stories about a tender offer by a financial journalist or TV commentator. Respondents do not disagree; indeed, they trumpet (at 10 n.2) "Congress's categorical language." But Respondents offer no explanation for why Congress, having been so careful in its express causes of action to apply a negligence standard only against specified defendants and statements, would want an inferred cause of action under Section 14(e) that *lacked* any such limits to impose a negligence standard, too.[6]

The government has no explanation for this glaring disconnect either. Instead, it seems to recognize that these restrictions cut *against* inferring a private remedy for negligence (*see* U.S. Br. 20, 32) and simply notes that these "restrictions do not apply to Commission enforcement actions" (*id.* at 32).

3. As Petitioners explained in their opening brief (at 34-36), allowing Respondents to recover under an inferred cause of action based on negligence also would circumvent the express cause of action in Section 18(a) of the 1934 Act. That provision applies to exactly the sorts of statements on which Respondents are suing here, but does not allow recovery for mere negligence. *See* 15 U.S.C. § 78r(a). Respondents do not dispute they could have brought their claims under Section 18(a) and that, had they done so, they would have needed to show more than negligence. But they claim (at 18-19) that their position does not displace Section 18(a) because Section 18(a) applies only to statements filed with the

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[6] Because this point goes to Congress's intent in 1968, when it passed the Williams Act, it is irrelevant that—as Respondents note (at 18)—the PSLRA adopted procedural protections for *all* securities suits three decades later.

SEC, and Section 14(e) applies to "*any* statement (filed or otherwise) in a tender contest."

But this gets it backwards. Of all the statements made in connection with a tender offer, the ones for which a negligence standard would make the *most* sense would be the mandatory disclosures filed with the SEC. *Cf.* Resp. Br. 21 (arguing that such filings should be subject to "more stringent review"). Yet, Section 18(a) shows that Congress declined to adopt a negligence standard even for such mandatory filings. If the Court were to affirm the Ninth Circuit's decision, no plaintiff who contends that a company has filed a misleading recommendation statement in connection with a tender offer would *ever* sue under Section 18(a); all such claims would be filed under the cause of action inferred from Section 14(e) instead. That is exactly the sort of circumvention this Court refused to facilitate in *Ernst & Ernst*, 425 U.S. at 210.

Once again, the government, for its part, seems to recognize that the inference of a private remedy for negligence that would allow parties to circumvent "the express private causes of action defined elsewhere in the securities laws" is problematic. U.S. Br. 32-33. So it stresses (at 32) that this problem does not impact the SEC, because it enjoys its own express cause of action for violations of Section 14(e).

3. Respondents' resort to statutory purpose and policy is unavailing.

Much of Respondents' position ultimately boils down to the notion (at 19-20) that the Court should extend the Ninth Circuit's inferred cause of action to negligence because to do otherwise would "undermine Congress's objectives." This argument does not just sound like *Borak;* it is explicitly based on *Borak* (at

23). Specifically, Respondents opine (at 22-23) that encouraging securities litigation based on negligent misstatements would have "profound benefits" because "[t]he SEC lacks the resources to monitor each recommendation statement in real-time," and thus needs plaintiffs' lawyers to "keep[] the process honest." Notably, the SEC itself does not make this argument. But more fundamentally, this sort of policy rationale is no more appropriate as a basis for *extending* a cause of action than it is for *creating* one.

Respondents' policy arguments are misguided in any event. For 49 years, until the Ninth Circuit's decision here, no court had ever recognized an inferred cause of action under Section 14(e) that reached merely negligent conduct. Respondents cannot seriously contend that the problem with private securities litigation under Section 14(e) during that time was that it was not *aggressive* enough. And as Petitioners explained in their opening brief (at 40-42), embracing a new negligence standard would not only supercharge the existing "merger tax" that plaintiffs' lawyers seek to extract, but would open up a whole new front of abusive litigation against stock analysts, financial journalists, and others. Respondents do not even try to refute the unquestionably broad reach of their proposed rule—even as they recognize (at 20) that it "makes more sense" to have a scienter standard under Section 10(b) because that provision applies to these same "speakers under no 'obligation' to say anything."

Respondents instead focus on the lower courts' experience with a different provision—Section 14(a). They claim (at 19) that courts "have overwhelmingly recognized that negligence is sufficient to state a claim under Section 14(a)," and say there has been no

"concrete harm" (at 22) in that context. In fact, lower courts are divided about the proper standard in Section 14(a) cases. *See Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428 (6th Cir. 1980) (adopting scienter requirement under Section 14(a) in case involving suit against outside accountants). Moreover, Section 14(a) simply prohibits violation of "such rules and regulations as the [SEC] may prescribe" relating to proxy solicitations, 15 U.S.C. § 78n(a)(1), and the SEC has drawn those rules to cover a much narrower class of statements than Section 14(e). *See* 17 C.F.R. §§ 240.14a-9, 240.14a-1. Combining a negligence standard with Section 14(e)'s more expansive scope would invite far more abuse.

If history teaches anything, it is that plaintiffs' lawyers will maximize any opportunity to assert violations of the securities laws and, as the PSLRA shows, that dynamic inevitably will lead to abuse. Accordingly, in the end, policy considerations just reinforce that this Court should reject the Ninth Circuit's unprecedented, inferred private right of action under Section 14(e) for mere negligence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

SHAY DVORETZKY
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., NW
Suite 1000
Washington, DC 20001
(202) 879-3939

GREGORY G. GARRE
Counsel of Record
BENJAMIN W. SNYDER
SAMIR DEGER-SEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

ANNIE M. GOWEN
LATHAM & WATKINS LLP
330 North Wabash Ave.
Suite 280
Chicago, IL 60611
(312) 876-7700

Counsel for Petitioners

April 8, 2019